United States v. McDonald, No. 05-30253

GOULD, J., concurring in judgment:

I concur in our court's judgment affirming the district court, but do so on a different rationale than that taken by the district court and by my colleagues. We consider McDonald's appeal of the district court's denial of his motion to suppress his custodial statements made without *Miranda* warnings, along with other evidence that he alleged was derived from his statements. The district court suppressed McDonald's incriminating statements but did not suppress the alleged derivative information, which the district court concluded was "obtained through independent sources." The majority affirms on its view that McDonald's statements did not direct investigation to the other challenged evidence, that is, to the third party testimonial evidence incriminating McDonald.

I would affirm the district court on the grounds that, in *Michigan v. Tucker*, 417 U.S. 433 (1974), the United States Supreme Court held that the introduction of testimony of a witness discovered because of a *Miranda* violation did not violate the Fifth Amendment. Similarly, in *Oregon v. Elstad*, 470 U.S. 298 (1985), the Supreme Court held that the "fruit of the poisonous tree" doctrine did not apply to physical fruits of a *Miranda* violation. Notwithstanding a brief period of uncertainty on these precedents occasioned by the holding of *United States v. Dickerson*, 530 U.S. 428 (2000), that *Miranda* was constitutionally based and

could not be changed by legislation, more recently in *United States v. Patane*, 542 U.S. 630 (2004), the Supreme Court reaffirmed its prior precedents and said that "our decision not to apply *Wong Sun* to mere failures to give *Miranda* warnings was sound at the time *Tucker* and *Elstad* were decided, and we decline to apply *Wong Sun* to such failures now." *Id.* at 643. The "fruit of the poisonous tree" doctrine has no applicability to the evidence that McDonald urged was derived from his personal statements made without *Miranda* warnings. The question whether the fruits doctrine applies at all is logically antecedent to whether the challenged third-party testimony of several witnesses was indeed a "fruit," or instead was derived from an independent source or was the subject of inevitable discovery. Accordingly, I would affirm the district court on the grounds that *Wong Sun* and its principle of exclusion of fruits of constitutional violations do not apply to the challenged third-party testimonial evidence, even if that evidence was in fact obtained as a result of the *Miranda* violation and McDonald's statements. Given my view of this issue, I need not reach the questions of independent source and inevitable discovery.